



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

August 27, 1998

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Dorothy A. Harbeck, Esq.  
Graham, Curtis & Sheridan  
50 West State St., Suite 1008  
Trenton, NJ 08608

RE: MUR 4719  
New Jersey Republican State Committee and  
H. George Buckwald, as treasurer

Dear Ms. Harbeck:

Based on a complaint filed with the Federal Election Commission on September 11, 1997, and information supplied by your clients, the Commission, on June 9, 1998, found that there was reason to believe that the New Jersey Republican State Committee and H. George Buckwald, as treasurer ("the Committee"), your clients, violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

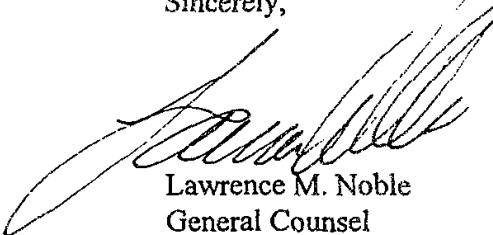
If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

Dorothy A. Harbeck, Esq.  
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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Susan L. Lebeaux, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence M. Noble", is written over the typed name.

Lawrence M. Noble  
General Counsel

Enclosure  
Brief

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of

New Jersey Republican State Committee and  
H. George Buckwald, as treasurer

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MUR 4719

**GENERAL COUNSEL'S BRIEF**

**I. STATEMENT OF THE CASE**

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Renee Steinhagen, Executive Director of the Public Interest Law Center of New Jersey. See 2 U.S.C. § 437g(a)(2). On June 9, 1998, the Commission found reason to believe that the New Jersey Republican State Committee and H. George Buckwald, as treasurer ("the Committee"), violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i).

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Applicable Law**

An organization which is a political committee under the Federal Election Campaign Act of 1971, as amended ("the Act"), must follow prescribed allocation procedures when financing political activity in connection with federal and nonfederal elections. 11 C.F.R. §§ 102.5 and 106.5(g). These rules implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. §§ 441a and 441b.

A party committee, such as the Committee, that has established separate federal and nonfederal accounts, must make all disbursements, contributions, expenditures and transfers in

connection with any federal election from its federal account. 11 C.F.R. § 102.5(a)(1)(i). Only funds subject to the limitations and prohibitions of the Act shall be deposited in the separate federal account. *Id.* No transfers may be made to the federal account from any other accounts maintained by the committee for the purposes of financing nonfederal activity, except as provided in 11 C.F.R. § 106.5(g). *Id.* The Act prohibits corporations and labor organizations from making contributions in connection with federal elections, and prohibits political committees from knowingly accepting such contributions. 2 U.S.C. § 441b(a). Moreover, the Act provides that no person shall make contributions to a state committee's federal account in any calendar year which in the aggregate exceed \$5,000, and prohibits the state committee from knowingly accepting such contributions. 2 U.S.C. §§ 441a(a) and (f).<sup>1</sup>

Pursuant to 11 C.F.R. § 106.5(g)(1)(i), state party committees that have established separate federal and nonfederal accounts must pay the entire amount of an allocable expense from the federal account and shall transfer funds from the nonfederal to the federal account solely to cover the nonfederal share of that allocable expense. Further, such committees must allocate both their administrative and generic voter drive expenses between their federal and nonfederal accounts using the "ballot composition method." 11 C.F.R. § 106.5(d). While the allocation ratio generally is calculated at the beginning of a two-year election cycle, in states such as New Jersey that hold federal and nonfederal elections in different years, state committees must allocate generic voter drive costs by applying the ballot composition method to the calendar year in which the election is held. 11 C.F.R. § 106.5(d)(2). Administrative costs are still

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<sup>1</sup> During the 1995-96 election cycle, New Jersey permitted individuals, corporations and labor organizations to contribute \$25,000 to state political party committees. N.J. Stat. Ann. § 19:44A-11.4 (1995 and 1996).

allocated according to the ballot composition ratio based on the two-year federal election cycle.

Id.

Under the ballot composition method, a state committee allocates its administrative and generic voter drive expenses based on the ratio of federal offices expected on the ballot to total federal and nonfederal offices expected on the ballot in the next general election to be held in its state. 11 C.F.R. § 106.5(d)(1)(i). In calculating a ballot composition ratio, a state committee shall count the federal offices of President, United States Senator, and United States Representative, if expected on the ballot in the next federal election, as one federal office each. The committee shall count the nonfederal offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one nonfederal office each, and shall count the total of all other partisan statewide executive candidates, if expected on the ballot in the next general election, as a maximum of two nonfederal offices. Further, the committee shall also include in the ratio one additional nonfederal office if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year federal election cycle. Finally, state committees shall also include in the ratio one additional nonfederal office. 11 C.F.R. § 106.5(d)(1)(ii).

**B. Factual Background**

1. The Committee's Calculations of the Ballot Composition Ratios
  - a. Generic Voter Drive Expenses

The Committee's 1995 Schedule H1 for shared federal and nonfederal generic voter drive expenses showed a 0% federal allocation, since there were no federal elections held that year. In 1996, in calculating its ballot composition ratio for shared generic voter drive expenses, the

Committee took one point each for the President, U.S. Senate, and U.S. Representative races. See 11 C.F.R. § 106.5(d)(1)(ii). With respect to the New Jersey elections, the Committee took one point each for the categories of State Senate, State Representative, and local candidates, and the extra nonfederal point. See id. Based on its calculated ratio of the total of federal offices (3) to the total federal and nonfederal offices (7), the Committee's 1996 allocation was 42.86% federal and 57.14% nonfederal.

The Committee's reporting of transfers from the nonfederal account to the federal account do not distinguish between generic voter drive and administrative expenses. Specifically, the Committee's 1996 Schedules H3 showing the transfers all show one dollar figure on the combined "Admin/Voter Drive" line on the form, and it is not possible to separate out which transfers relate to which of the two categories. Looking at the disbursements on the Committee's 1996 Schedules H4, the Committee appears to have attributed all of the shared administrative and generic voter activity to the "administrative" category, even when the purpose of some of the disbursements are denoted as for GOTV activities. For purposes of this matter, this Office has separated out those disbursements that are denoted as for GOTV activities, amounting to \$50,460 in 1996, and assumed the Committee applied the allocation ratio of 42.9% federal/57.1% nonfederal when transferring nonfederal funds to the federal account to cover these expenses. Under this methodology, the Committee transferred \$28,813 to the federal account in 1996 for the nonfederal portion of shared generic voter drive expenses. See Attachment (chart which includes the Committee's allocation activity in 1995-1996 for administrative and generic voter drive expenses).

b. Administrative Expenses

In 1995, the Committee, in calculating its ballot composition ratio for shared administrative expenses, took one point each for the U.S. Senate and U.S. House races, but none for the Presidential race, even though there was a general election for President expected in 1996, within the two-year election cycle to be covered by the calculation. With respect to New Jersey elections, the Committee originally took one point each for the State Senate and State Representative categories, two points for the local candidates category and the extra non-federal point. Based on its calculation of the ratio of federal offices (2) to the total of federal and nonfederal offices (7), the Committee's original allocation was 28.57% federal and 71.43% nonfederal, and a review of the Committee's transfers shows that during 1995 it allocated approximately 28.6% of its shared administrative expenses to the federal account. In March 1996, in response to a March 6, 1996 Request for Additional Information from the Commission's Reports Analysis Division ("RAD") stating that the Committee was permitted to take only one point, not two points, for the local candidates category, the Committee filed an amended Schedule H1 for shared administrative expenses, showing a federal allocation of 33.33%, and made a corresponding corrective transfer of \$39,848 from its federal to its nonfederal account.

As discussed previously, the ballot composition ratio for shared administrative expenses is supposed to remain constant for both years of the two-year election cycle. See 11 C.F.R. § 106.5(d)(2). A review of the Committee's transfers, however, shows that it used an allocation ratio of 42.9% federal/57.1% nonfederal for shared administrative expenses during 1996--the same ratio used for shared generic voter drive expenses during 1996. In all, the Committee had \$4,117,467 in shared administrative expenses in 1995 and 1996, and, based on the allocation

ratios discussed above, transferred-in \$2,522,145 to its federal account for the nonfederal portion of those administrative expenses.<sup>2</sup> See Attachment.

Since the proper application of the ballot composition method depends on the actual election expectations facing a committee in its particular state, before discussing the analysis of the Committee's actions, it is necessary to set forth the election situation in New Jersey in the relevant time-period.

## 2. New Jersey Elections in 1995 and 1996

The New Jersey legislature consists of two houses: a 40-member Senate and an 80-member General Assembly. Legislators are elected from 40 legislative districts. The voters in each district elect one Senator and two members of the General Assembly. Legislative elections are held in November of each odd-numbered year. General Assembly members serve two-year terms, and Senators serve four year terms, except for the first term of a new decade, which is only two years. Interim appointments are made to fill vacant legislative seats, and the office is on the ballot for the next general election, unless the vacancy occurred within 51 days of the election, in which case the appointment stands until the following general election.

In 1995, the general election was held on November 7. At that time, in addition to local races, all of the General Assembly seats were up for election as well as a single vacant Senate seat in District 5, due to the death of the incumbent.<sup>3</sup> In 1996, the general election was held on November 5. In addition to local races, there was one vacant Assembly seat in District 21 on the

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<sup>2</sup> This figure does not include the \$28,813 transferred-in for generic voter drive expenses. See discussion supra.

<sup>3</sup> While the New Jersey elections office did not have the exact date of the incumbent's death, it must have been before February 1995 when its records showed an interim appointment for the vacant seat was made. The next general election for all State Senate seats was in 1997.



ballot, due to the death of the incumbent in March 1996. While a State Senator in District 8 died in December of 1996, this occurred after the general election, and that seat was filled by interim appointment until the next general election in 1997.

### C. Analysis

There is probable cause to believe that the Committee violated 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i) by miscalculating its ballot composition ratios for shared administrative expenses in 1995 and 1996 and for shared generic voter expenses during 1996, thereby improperly overfunding its federal account from its nonfederal account. As a result of this overfunding, there is also probable cause to believe that that the Committee violated 2 U.S.C. §§ 441a and 441b because in 1995 and 1996 the State of New Jersey allowed individuals, corporations and labor organizations to contribute \$25,000 to state political party committees, N.J. Stat. Ann. §19:44A-11.4 (1995 and 1996).

#### 1. The Committee's Miscalculation of the Ballot Composition Ratios

##### a. Generic Voter Drive Expenses

The Committee's 1996 Schedule H1 should have reflected the ratio applicable only to the allocation of the costs of shared generic voter drive expenses based on the 1996 ballot composition method calculation, while the allocation for administrative expenses should have been based on a ratio calculated in 1995 for the two year Congressional election cycle. 11 C.F.R. § 106.5(d)(2). However, even if the Committee had applied the 1996 Schedule H1 ratio only to its generic voter drive expenses, the Committee would have impermissibly transferred funds from its nonfederal account to its federal account based on a 42.86% federal/57.14% nonfederal ratio. The correct allocation for the shared generic voter drive expenses in 1996 was 60%

federal/40% nonfederal, based on the assignment of only two nonfederal points, one each to the local candidates and extra nonfederal point categories. See MUR 4674 (New Jersey Democratic State Committee correctly determined that 60% of all 1996 generic voter drive expenses would be paid for with federal dollars, and the other 40% would be paid for with nonfederal dollars). In other words, the Committee incorrectly assigned points to the State Senate and State Representative categories.

The inclusion of the District 21 Assembly seat on the ballot due to the death of the incumbent in March 1996 would not provide any basis for assigning a nonfederal point to the State Representative category. The Commission's rationale in adopting the ballot composition method leads to the conclusion that a state committee cannot include a nonfederal point in its ballot composition ratio to account for an election of a State Senator or State Representative seat in a single legislative district. The analysis starts with the Commission's Explanation and Justification ("E&J") for 11 C.F.R. § 106.5(d), in which it stated that it was taking an "average ballot" approach, whereby "committees are to calculate a ballot composition ratio according to the ballot which an average voter would face in that committee's state or geographic area, rather than basing the ratio on the aggregates of all federal and all non-federal races on the ballot." 55 Fed. Reg. 26058, 26064 (June 26, 1990). In 1992, the Commission revised 11 C.F.R. § 106.5(d) to permit all state and local committees to add an additional nonfederal point in computing ratios using the ballot composition method in order to compensate for underrepresentation of nonfederal offices in the then-current formula. In discussing the various comments received in response to its Notice of Proposed Rulemaking concerning the proposed additional point, the Commission noted that "the ballot composition ratio was never anticipated to precisely reflect all

state and local party activity in all states in all election cycles. It believes that the formula's use of the 'average ballot concept,' which reflects variations in different states and localities in each election, as well as the special rules for states that hold statewide elections in non-federal election years, provide the necessary flexibility in this area." 57 Fed. Reg. 8990, 8991 (March 13, 1992).

AO 1991-6 is consistent with the above analysis. In that matter, the California Democratic Party ("CDP") had asked the Commission, in a case where two U.S. Senate seats would be on the ballot in the November 1992 general election, whether it should count each senatorial election as a separate federal point or treat the two senatorial contests together as one federal point. In concluding that the CDP should include a point for each U.S. Senate seat in calculating its ballot composition ratio, the Commission pointed to its stated intention in the E&J for 11 C.F.R. § 106.5(d). In adopting the ballot composition method, the Commission explained, its approach reflected the use of an "average ballot" concept in which the number of federal offices counted corresponds to the number of federal candidates the average voter could vote for in the general election. The Commission stated:

Thus, while there will be 52 Congressional races in California in 1992, a voter will only have the opportunity to cast a ballot for the Congressional race in his or her district, and therefore the ballot composition method assigns one point for all Congressional races in the state. In contrast, a U.S. Senate seat, as a state-wide office, appears on all the ballots in the state. If two Senate seats are on the ballot in the general election, the average voter will have the ability to vote for candidates for each office.

The Commission's conclusion in AO 1991-6 that the CDP should include a point for each Senate seat rests on the fact that each average voter in California would have the opportunity to vote for two Senators. By analogy, in the present case, only the New Jersey voters in the single legislative district where the vacant Assembly seat was located would have had the opportunity

to vote for candidates for that seat and the average voter in New Jersey would not.<sup>4</sup> Based on the average ballot concept, therefore, no nonfederal point should have been assigned to the State Representative category in 1996.<sup>5</sup>

Moreover, there was no basis upon which the Committee could assign a nonfederal point to the State Senator category in 1996. Certainly, the vacancy created by the death of State Senator Haines in December 1996, after the 1996 general election, could not possibly provide such a basis. Section 106.5(d)(1)(ii) explicitly states that a committee should count the nonfederal office of State Senator as one point only "if expected on the ballot in the next general election." Since the Committee had no such expectation in 1996, it was completely unjustified in assigning a point to the State Senate category during that year.

Based on the Committee's disbursements for generic voter drive expenses during 1996 amounting to \$50,460, see discussion supra, and based on a nonfederal share of approximately 57.1% instead of 40%, the Committee transferred in to the federal account \$28,813, instead of the proper \$20,184, an overpayment of \$8,629.<sup>6</sup> See Attachment.

<sup>4</sup> Similarly, in AO 1991-25, the Commission concluded that when the Pennsylvania state committees could not have known when they calculated their ballot composition ratios in early 1991 that U.S. Senator Heinz would die in April 1991, and a special election would be held to fill that vacancy in November 1991, they should add an additional federal point to the ratio for generic voter drive expenses for the April-November 1991 period. This approach is consistent with AO 1991-6, since under the average ballot approach, all Pennsylvania voters would have had the opportunity to vote for the seat. We note that the Committee in this matter appears to have used a 42.86% allocation for both its administrative and generic voter drive expenses for the full 1996 year.

<sup>5</sup> In the 1990 E&J for 11 C.F.R. §106.5(d), the Commission noted that that the new provision generally covered years in which special elections were held, but that the Commission had not tried to address every variation, and that some would have to be determined on a case-by-case basis. 55 Fed. Reg. supra at 26064. In this Office's view, the adoption of the average ballot concept in the regulation covers the situation at issue here, and the Commission's decision two years later to permit the extra non-federal point to compensate for underrepresentation of nonfederal offices is further justification for not making an exception to the general approach.

<sup>6</sup> All figures have been rounded to the nearest dollar.

b. Administrative Expenses

The Committee also miscalculated the ballot composition ratio for shared administrative expenses for the 1995-1996 cycle. Based on the election situation in New Jersey, the Committee should have taken three federal points, one each for the 1996 Presidential, U.S. Senate and U.S. House races and three nonfederal points, one each for the 1995 State Assembly race in which all the seats were up for election, the local candidates races, and the extra nonfederal point. This calculation would have resulted in a 50% federal allocation, as opposed to the Committee's 28.6% ratio (amended to 33.33%) for 1995, and its use of the 42.86% ratio miscalculated for generic voter drive expenses to apply to administrative expenses as well in 1996. In calculating the ballot composition ratio for 1995, the Committee erred in not taking a federal point for the Presidential election in 1996. See AO 1993-17 (a state party committee must take the maximum number of federal points that are required). The Committee also erred in 1995 by taking two points, instead of one point, for the local candidates category and by assigning one point to the State Senator category. While according to the New Jersey Elections Office, there was one special election for a State Senate seat in District 5 in 1995 due to the death of an incumbent, for the same reasons discussed above, the single non-statewide election did not entitle the Committee to include a corresponding nonfederal point. See MUR 4674 (the New Jersey Democratic State Committee's two-year ballot allocation ratio correctly determined that 50% of all administrative expenses would be paid for with federal dollars and the other 50% would be paid for with nonfederal dollars).

As a result of the Committee's miscalculated ballot composition ratios during 1995 and 1996, the Committee made significantly excessive transfers from its nonfederal account to its

federal account, and impermissible funds entered the federal campaign process. A review of the Committee's transfers-in to the federal account in 1995 of \$752,149, based on a 28.6% federal/71.4% nonfederal allocation and transfers-in in 1996 of \$1,769,996 based on a 42.9% federal/57.1% nonfederal allocation, for a total of \$2,522,145, when the correct federal/nonfederal allocation in 1995 and 1996 would have been 50% each, shows that the Committee overpaid the federal account \$423,564 for shared administrative expenses in 1995 and 1996.<sup>7</sup> Adding to this figure the Committee's 1996 overpayment to the federal account for generic voter drive expenses of \$8,629, the Committee's total overpayment from the nonfederal to the federal account for shared administrative and generic voter drive expenses in 1995 and 1996 was \$432,193. See Attachment.

c. Conclusion

Because the Committee miscalculated its ballot composition ratios for shared administrative expenses in 1995 and 1996 and for shared generic voter drive expenses during 1996, and improperly overfunded its federal account from its nonfederal account as a result, there is probable cause to believe that the New Jersey Republican State Committee and H. George

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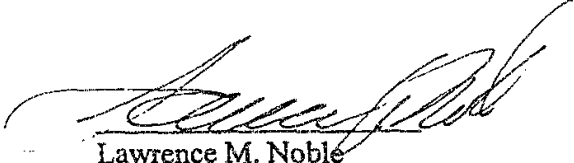
<sup>7</sup> To reach the \$423,564 figure, this Office used the percentages to calculate a \$463,412 overpayment, then subtracted from that figure the corrective transfer back of \$39,848 which the Committee made when it amended its 1995 Schedule H1 in March of 1996 to increase the federal allocation from 28.6% to 33.33%. See Attachment (showing overpayment of administrative and generic voter drive expenses and subtracting corrective transfer from that total to calculate the total non-federal overpayment). In calculating these figures, this Office decided to remove from the administrative category, and add to the generic voter drive category, only those 1996 disbursements (and corresponding transfers-in) denoted as GOTV activities since these were the only ones it could assume with certainty belonged in the latter category, and did not, for example, place in this category almost \$1.2 million in disbursements (and corresponding transfers-in) that were denoted as media purchases. This methodology favors the Committee as there was a greater discrepancy between the proper allocation ratio in 1996 and the one used by the Committee for generic voter drive expenses than between the proper allocation ratio in 1996 and the one used by the Committee for administrative expenses. This Office also did not include \$77,533 paid by the Committee to its federal account in 1997 for administrative/generic voter drive expenses apparently incurred during 1996, another decision which is favorable to the Committee in calculating its overpayment.

Buckwald, as treasurer, violated 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i). Additionally, because in 1995 and 1996 the State of New Jersey allowed individuals, corporations, and labor organizations to contribute \$25,000 to state political party committees, N.J. Stat. Ann. § 19:44A-11.4 (1995 and 1996), there is probable cause to believe that the New Jersey Republican State Committee and H. George Buckwald, as treasurer, violated 2 U.S.C. §§ 441a and 441b.

### III. GENERAL COUNSEL'S RECOMMENDATION

1. Find probable cause to believe that the New Jersey State Committee and H. George Buckwald, as treasurer, violated 2 U.S.C. §§ 441a and 441b and 11 C.F.R. §§ 102.5(a)(1)(i) and 106.5(g)(1)(i).

8/27/98  
Date

  
Lawrence M. Noble  
General Counsel

#### Attachment

Chart showing calculation of the Committee's 1995-1996 nonfederal overpayment